

(6)
No. 89-1749



IN THE
Supreme Court of the United States

October Term, 1989

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T. MCFARLAND, EDWARD M. KRESKY and HENRY G. WILLIAMS, in their official capacity as Commissioners of the Public Service Commission of the State of New York,

Petitioners,

vs.

NATIONAL FUEL GAS SUPPLY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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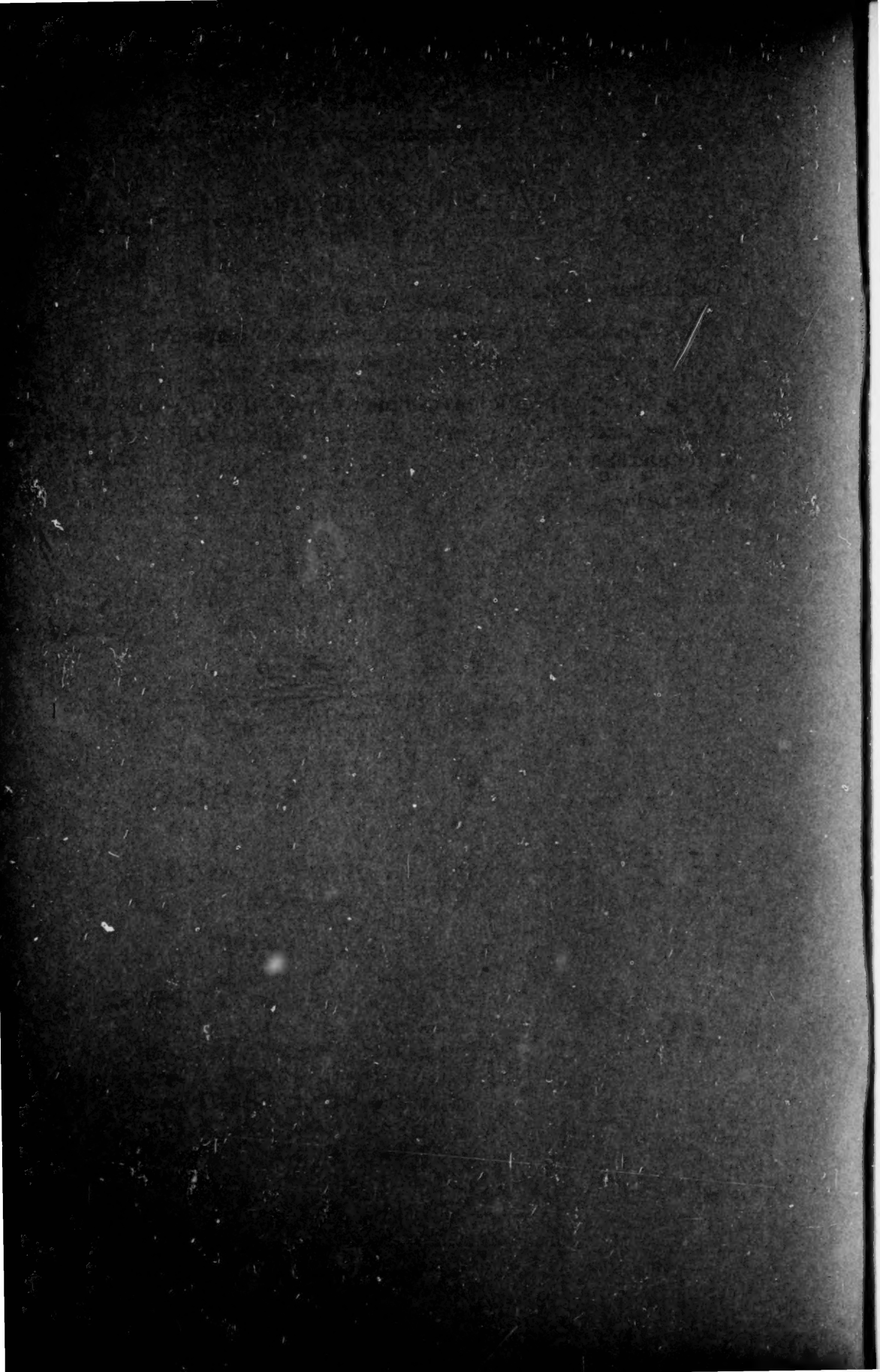


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Preliminary Statement

The United States Court of Appeals for the Second Circuit has decided that federal law preempts states from regulating construction practices on interstate gas pipelines. The Public Service Commission of the State of New York and its individual commissioners (PSC) have sought certiorari because no federal statute evidences even the slightest Congressional intent to preempt states from site-specific environmental regulation of interstate gas transmission facilities. Moreover, site-specific environmental regulation is necessary to preserve New York's natural resources, protect its environment and, as discussed below, prevent needless disruption of local communities.

The Commission's petition for certiorari demonstrates that: (1) the legislative history of the Natural Gas Act (NGA) and decisions of this Court emphasize that the statute was *not* intended to diminish the states' regulatory power (Petition, "Pet." 11-13);¹ (2) the lower court misapplied dicta from a recent decision of this Court, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) in reading the NGA as preempting the states (Pet. 16-17); (3) rather than being a preemptive statute, the National Environmental Policy Act (NEPA) was simply designed to require federal agencies to take a "hard look" at the environmental consequences of their actions (Pet. 13); (4) there is no conflict between state site-specific environmental regulation and the Federal Energy Regulatory Commission's (FERC's) certification of interstate gas pipelines (Pet. 13-15, citing Appendix "App." 44a-46a); and, (5) the Second Circuit ignored both this Court's standard for facial challenges to state

¹ Both the Senate and House reports on the Natural Gas Act emphasize that "[t]he bill takes no authority from State Commissions" (see Pet. 12, note 8 for references).

legislation (Pet. 16-17) and case law allowing dual, state and federal, environmental regulation of interstate pipelines (Pet. 18-19).

The respondent, National Fuel Gas Supply Corporation (NFG), has opposed certiorari on the grounds that this Court in *Schneidewind* interpreted the NGA as preempting state regulation of interstate transmission facilities and, in any event, state regulation conflicts with FERC's certification of interstate pipelines.² Point I, *infra*, shows that neither *Schneidewind* nor any other decision of this Court supports NFG's position. Point II establishes that there is no conflict between FERC's regulation and New York's site-specific review of interstate facilities.³

² More specifically, NFG has: (1) failed to cite a single word of the NGA in support of its contention that Congress intended to preempt state environmental regulation; (2) essentially ignored NEPA; (3) answered the PSC's evidence that there is no state/federal conflict with an erroneous claim that FERC regulations calling for the inclusion of environmental data in pipeline filings demonstrate that FERC has preempted the field; and, (4) implied that it has not brought a facial challenge to Article VII.

³ NFG has failed to reference a scintilla of evidence to support its contention that state regulation frustrates federal purposes. Moreover, it has not answered the petition's showing that preemption would endanger New York's wildlife, wetlands, vistas and landmarks.

POINT I

Federal law does not preempt site-specific environmental regulation by the states.

Inasmuch as federal preemption of site-specific environmental regulation of interstate pipelines is supported by neither the language nor the legislative history of the Natural Gas Act, NFG cites *Schneidewind* for the proposition that the NGA preempts all state regulation of interstate facilities (NFG, 13-15). *Schneidewind* simply holds that states can not regulate security issuances relating to interstate projects because such regulation could easily prevent construction of interstate facilities⁴ (485 U.S. at 310) and, in any event, FERC's regulation addresses the concerns covered by the states' review of security issuances. In the Court's words, "FERC directly monitors the same matter through its accounting requirements.... FERC may prevent such problems through its certification power ... FERC's detailed examination of a company's finances includes review of securities issuances...." 485 U.S. at 309. By contrast, FERC does not address in detail site-specific environmental issues covered by Public Service Law Article VII. Indeed, it has recognized that the PSC conducts site-specific environmental review in referring to PSC analyses in environmental impact statements.⁵

⁴ A company constructing new facilities needs funds to hire contractors and acquire materials. If it is unable to issue securities to obtain those funds, it can not build. In contrast, environmental regulation does not impede construction of federally certified activities (App. 44a-46a). *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572 (1987).

⁵ According to NFG, FERC has repeatedly stated that it enjoys exclusive jurisdiction over natural gas transmission facilities (NFG 14-15 n. 11). While FERC has asserted power to determine whether and where an interstate line should be certified, a power which we do not question, it has not attempted to preempt state regulation of site-specific environmental issues.

NFG also contends that *FPC v. East Ohio Gas Company*, 338 U.S. 464, 468 (1950) held that the Natural Gas Act applied to the transportation, as well as the sale, of natural gas (NFG 15). The NGA's application to transportation does not touch upon state environmental regulation.

POINT II

Site-specific environmental review by New York State does not conflict with FERC regulation.

As discussed above, the uncontroverted record evidence demonstrates that the PSC's site-specific environmental review of construction practices does not conflict with FERC's enforcement of its statutory responsibilities (App. 44a-46a). Rather than confront this evidence, NFG argues that a FERC regulation calling for the provision of environmental data on projects such as the respondent's West Seneca facility shows that there is no room for New York's limited regulation (NFG 17).⁶

The respondent's environmental presentation to FERC on West Seneca consisted of 8 pages of text, a typical stream crossing diagram and charts showing soil types crossed (Joint Appendix, Second Circuit Docket No. 89-7458 "Joint Appendix" 127-151). The presentation was supplemented by 1 1/2 pages of material when NFG revised the project (Joint Appendix 178-79), NFG's filing did not: (1) disclose how the applicant would protect streams and flood plains; (2) explain where NFG would obtain and discharge water for its hydrostatic testing of the pipeline; (3) detail how the applicant would handle or store hazardous material; (4) describe how NFG would either control noise or minimize the effects of construction on the local community; (5) specify the erosion control and revegetation methods

⁶ NFG also contends that the PSC has, in the past, delayed completion of an interstate pipeline project by allowing intervenors to its Case 70350 to litigate alternatives to a FERC-approved route (NFG 20). While it is not clear whether the PSC's review of the Columbia Gas pipeline project delayed or accelerated completion of that facility, the latter being more likely, the PSC has since made it clear that its Article VII review will be limited in all cases to site-specific environmental review.

that it intended to use for the soil types identified; or, (6) address the need for topsoil segregation on agricultural lands crossed by the line.⁷

There was no reason for FERC to require NFG to provide such information because FERC did not perform site-specific environmental review of NFG's proposal.⁸ It expressly left site-specific regulation of the West Seneca project to state and local permitting processes (App. 41a).⁹

NFG argues that it has, in any event, obtained its state and local permits from the responsible authorities (NFG 9, n.7). Although NFG did obtain permits for its original line, they have expired and, in any event, were not obtained from the responsible authority, the PSC. New York law centralizes environmental review of

⁷ Differences in streams to be crossed and lands to be traversed require different types of construction methods, which are not addressed by FERC's rules. 18 C.F.R. §2.69 (App. 75a); (App. 45a). Indeed NFG's filing acknowledged the applicant's need to obtain state and local stream and road crossing permits (Joint Appendix 130).

⁸ Moreover, the environmental review that FERC did conduct was pursuant to NEPA, which unquestionably is not a preemptive statute.

⁹ NFG quotes the Second Circuit's observation that the Commission could have intervened before FERC to present "contrary data" that would have addressed the deficiencies in NFG's environmental case (NFG 17). However, the theoretical possibility of New York residents or the PSC intervening in FERC proceedings to raise site-specific issues has no relevance to whether Article VII is preempted by FERC regulation because, absent such intervention, it is clear that FERC's regulation does not address site-specific issues. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) [overturning an FCC attempt to preempt state authority to set depreciation charges for intrastate rate-making purposes, notwithstanding the fact that federal law entitled the states to notice and an opportunity heard by the FCC on depreciation].

gas pipeline projects in the PSC¹⁰ and FERC calls for pipeline applicants to comply with local review. Therefore, the lower court had no basis for preempting Article VII.¹¹ *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572 (1987) [wherein this Court relied on federal regulations allowing state environmental regulation to uphold such state regulation].

Inasmuch as the NGA does not give FERC exclusive responsibility for the environmental effects of interstate gas transmission lines, this case is very different from *California v. Federal Energy Regulatory Commission*, _____ U.S. _____, 58 U.S.L.W. 4591 (1990), wherein this Court held that the Federal Power Act preempted states from imposing minimum water flows for federally certified hydroelectric stations. As the Court noted in *California*, the Federal Power Act directs FERC to promulgate licensing requirements to protect wildlife.

¹⁰ A state's method of issuing permits for road or stream crossings should not be preempted unless the federal government has taken over such regulation or the state's method impedes a federal purpose; to wit, the construction of interstate facilities. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). The record evidence shows that FERC has not taken over such regulation (App. 44a-46a), and Article VII's centralization of permits in the PSC expedites the construction of interstate projects (App. 46a) ["New York State's 'one-stop' permit process generally accelerates construction"].

¹¹ NFG claims that preemption should turn on whether Article VII imposes an "imminent possibility of collision" between state and federal regulation (NFG 19). Even if "imminent possibility" were the correct standard, which it is not (Pet. 18-19), preemption would not be appropriate because the PSC has repeatedly announced that it will apply Article VII in a manner that avoids conflict with FERC (App. 44a-46a).

While the Commission could bring a penalty action against a pipeline that refused to follow any chapter of the Public Service Law, it did not "threaten" NFG with such a suit (NFG 9, n. 7; 16, n. 12; 19, n. 15).

58 U.S.L.W. at 4593, 4595, *citing*, FPA Section 10(a); 16 U.S.C. Sections 803(a)(1)-(3), 803(j)(1)-(2). Inasmuch as a stream can only have a single water flow, FERC's statutory duty could not be met if states were allowed to set higher minimum stream flow requirements than those set by FERC in balancing the need to protect wildlife against project economics. 58 U.S.L.W. at 4595. There is no provision in the Natural Gas Act even resembling FPA Section 10(a) because FERC has not been directed to resolve site-specific environmental issues on interstate pipeline projects.¹²

¹² Unlike the "brief statement" of environmental factors required by 18 C.F.R. Section 157.14(a)(6-d) on interstate pipeline applications, (App. 99a), regulations under the Federal Power Act require a detailed environmental analysis of the environmental effects of hydroelectric projects. See 18 C.F.R. Sections 4.41, 4.51, 4.61.

Conclusion

Respondent National Fuel Gas Supply Corporation argues that this Court should not grant certiorari because all state regulation of interstate natural gas transmission facilities is preempted (NFG 12). Far from demonstrating that certiorari is not warranted, NFG's position only highlights the need for review.

Should federal law be read to bar state regulators from preventing construction of gas transmission lines at the crack of dawn in residential neighborhoods? Should not the states be able to protect streams and wetlands, to control traffic on major local thoroughfares and to preserve local landmarks? Has Congress prohibited the states from attempting to *expedite* the construction of interstate pipelines by centralizing the issuance of local permits in a single agency?

The lower court's answer to these questions will significantly affect local communities and natural resources throughout New York State for years to come. They clearly require further review.

Respectfully submitted,

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